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## ATTESTATION IN THE PRESENCE OF THE TESTATOR.

AT FIRST sight it does not seem difficult to determine when one person is in another's presence. No rule, however, has been laid down which has met with universal approval and it seems impossible to establish one, although the question has been discussed in numerous cases since the passage of the Statute of Frauds, 29 Car. II C. B. (1677) V, providing that a will shall be "attested and subscribed in the presence of said devisor, by three or four credible witnesses."<sup>1</sup> Must the testator see the witness, if he tries (and if so, how hard must he try), or will it be sufficient if he touches him, or hears him talking (or doing something else), or knows that he is present by means of other senses? Does the eyesight of the testator affect the rule, or his ability or inability to move? Does it change the rule if they are in different rooms, and does the size of the room or rooms and the amount of furniture and other obstructions affect it? An attempt will be made in this article to examine the rules given, in the light of these objections and others which have been raised from time to time.

In a general way the cases divide themselves into those where the statutes are construed liberally, giving to the word "presence" its popular meaning, and those in which the statutes are construed

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<sup>1</sup> This provision as to subscription by the witnesses in the presence of the testator is found in the Statute of Victoria—St. 7 Wm. IV and 1 Victoria, C. 26, IX (1837), and in statutes in practically all of the United States (not New York, Arkansas and Pennsylvania). 30 Am. & Eng. Enc. Law, 2 ed., 597; 1 Woerner, Am. Law of Ad'm, 67.

more strictly, and greater emphasis is laid upon the purpose for which they were passed, which seems to have been to prevent the substitution of a surreptitious will.<sup>2</sup> In considering this purpose the courts have usually applied the tests of mental apprehension ("conscience presence") or vision. These tests and the reasons for and against them will be considered in the following order:

I. MENTAL APPREHENSION ("Conscious Presence").

II. VISION—(a) Of what—the witness' body or the signing.

(1) *The testator saw the witness.*

(2) *He might have seen him if he had looked.*

(a) Can he move his position, and if so how much?

Is this affected by his ability or inability to see or move? Is it affected by the fact that the testator and witnesses are in different rooms?

I. MENTAL APPREHENSION ("Conscious Presence").

In *Healey v. Bartlett*,<sup>3</sup> "the general rule, if not the universal rule" is given: "When a testator is not prevented by physical infirmities from seeing and hearing what goes on around him \* \* \* his will is attested in his presence if he understands and is conscious of what the witnesses are doing when they write their names, and can, if he is so disposed, readily change his position so that he can see and hear what they do and say. \* \* \* In other words, if he has knowledge of their presence, and can, if he is so disposed, readily see them write their names, the will is attested in his presence, even if he does not see them do it and could not without some slight physical exertion. It is not necessary that he should actually see the witnesses for them to be in

<sup>2</sup> "The statute required attesting in his presence to prevent obtruding another will in place of the true one." *Shires v. Glascock*, C. P. 1687, 2 Salk. 688. "The statute is designed to prevent substitution and fraud upon an intending testator." *In re Beggan's Will*, 68 N. J. Eq. 572, 59 Atl. 874, Cost. Cas. Wills, p. 148 (1905).

<sup>3</sup> 73 N. H. 110, 59 Atl. 617, 6 Am. & Eng. Ann. Cas. 413 (1904).

his presence. They are in his presence whenever they are so near him that he is conscious of where they are and what they are doing, through any of his senses, and are where he can readily see them if he is so disposed. The test, therefore, to determine whether the will of a person who has the use of all his faculties is attested in his presence, is to inquire whether he understood what the witnesses were doing when they affixed their names to his will, and could if he had been so disposed, readily have seen them do it."

This rule about "conscious presence" seems to be used by the courts in some cases because it is elastic and enables the court to hold as valid a will, which by a stricter construction of the statute would be declared void. Thus in *Riggs v. Riggs*<sup>4</sup> it appeared that the testator had received a severe injury, and was lying upon his bed unable to move. His sight was unimpaired, but he could only look upward, as he was incapable of turning his head so as to see what took place at his side. The court, although recognizing that such an attestation is held not to be sufficient in such cases as *Tribe v. Tribe*<sup>5</sup> and *Graham v. Graham*,<sup>6</sup> decided that the attestation was sufficient and that "so nice and narrow a construction (as that in *Tribe v. Tribe*, *Graham v. Graham* and other similar cases cited in *Riggs v. Riggs*) is not required by the letter, and would defeat the spirit of our statute." "It is true," says the court, "that it is stated in many cases that witnesses are not in the presence of a testator unless they are within his sight; but these statements are made with reference to testators who can see. As most men can see, vision is the usual and safest test of presence, but it is not the only test. A man may take note of the presence of another by the other senses, as hearing or touch. Certainly, if two blind men are in the same room, talking together, they are in each other's presence. If two men are in the same room, conversing together, and either or both bandage or close their eyes, they do not cease to be in each other's

<sup>4</sup> 135 Mass. 238, 46 Am. Rep. 464, Cost. Cas. 160 (1883).

<sup>5</sup> Prerog. Court of Canterbury (1849) 1 Rob. Ecc. 775; 4 Gray's Cas., 2 Ed., 193.

<sup>6</sup> 32 N. C. 219 (1849).

presence." The case is, therefore, treated as an exceptional one, similar to that of a blind man.

Cunningham *v.* Cunningham<sup>7</sup> is cited, too, with approval, in Healy *v.* Bartlett (ante), but the decision in this case affirming the validity of the will was placed upon the ground that the witness almost immediately after signing returned to the testator and showed him the signature. From where the testator sat he could not see the table which was used by the witnesses when signing. He could have seen it by moving two or three feet. The contestants insisted that the attestation was insufficient, because the testator did not and could not see the witnesses subscribe their names from where he sat, "and their contention," says the court, "has an abundance of authority in support of it. \* \* \* The rule laid down in these authorities is that the attesting and subscribing by the witnesses must take place within the testator's range of vision, so that he may see the act of subscribing, if he wishes, without a material change of his position; and that he must be mentally observant of the act while in progress." The Minnesota court does not seem to approve this rule, but its decision upholding the validity of the will is based upon the reason heretofore mentioned.

This case illustrates a danger of the "conscious presence" rule, which is that it is somewhat vague and indefinite. The court evidently felt this, for the remark is made in connection with the will of a blind man that it is held good if made within his conscious presence, "whatever that means."

In the case of Calkins *v.* Calkins<sup>8</sup> the court says that "in the case of a blind person, his will would be attested in his presence if the act was brought within his personal knowledge through the medium of other senses."

This test seems to have been applied by the courts in cases where the testator was disabled as in Riggs *v.* Riggs (ante) or where the court felt that it was quite probable that the testator knew what was going on, and therefore the purpose of the stat-

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<sup>7</sup> 80 Minn. 180, 83 N. W. 58, 51 L. R. A. 642, 81 Am. St. Rep. 256; Cost. Cas. Wills, 155 (1900).

<sup>8</sup> 216 Ill. 458, 464; 75 N. E. 182, 183; 1 L. R. A. (N. S.) 393; 108 Am. St. Rep. 233 (1905).

ute (to avoid fraud) was not very likely to have been defeated.

In this connection it may be noted that if the testator is mentally unconscious the act is not in his presence. Mere corporeal presence will not suffice,<sup>9</sup> for "when the condition of the testator is such that immediately after the acknowledgment and before the subscription of the will, from sleep or other cause, he becomes insensible to what is passing around him, and unconscious of the act of subscribing, which he has a right to supervise, and thus in fact is unable to determine whether he will or will not supervise it, the subscription thus made is not in the sense or within the objects of the statute made in his presence." *Orndorff v. Hummer*.<sup>10</sup>

## II. VISION—(a) Of what?

Vision is a commonly applied test. What is it that the testator must see? It would seem that the courts which apply the rule of "conscious presence" would have to hold that it might not be necessary to see the witness at all, but those courts which hold that it is necessary to see him usually hold, too, that it is necessary to see him sign; i. e., the act of signing, not the witness' back, for in the latter case he might substitute another will. So in *Graham v. Graham*,<sup>11</sup> witnesses who signed in another room where their backs could be seen by the testator if he turned his head and looked around the side of the door, were held not to have signed in his presence. The court said that the testator must be able to see the paper, if he will look, and to know for himself that it is a true one.<sup>12</sup> If the object is to prevent the

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<sup>9</sup> *Watson v. Pipes*, 32 Miss. 451; *Nock v. Nock's Ex'rs*, 10 Gratt. 106. For other cases so holding see note to *Healy v. Bartlett* in 6 Am. & Eng. Ann. Cas. 413, 414.

<sup>10</sup> 12 B. Mon. 619.

<sup>11</sup> 32 N. C. 219 (1849).

<sup>12</sup> "In the case before us, it does not appear whether the decedent was able to turn his head to one side or not. Two of the witnesses said that if he had turned his head to one side he could have seen the paper. If he could have done so without risk or danger, or not contrary to his physician's advice, and was of testamentary capacity (and there is no proof before us to the contrary), then there was a compliance with the statute in reference to the attestation. *Cornelius v. Cornelius*, 52 N. C. 593 (1860). But even if he was of testamentary capacity, and there was no fraud or undue influence, yet if he was unable to partly

chance of fraud this would seem a wise, though certainly a strict, construction. In a note in 6 Am. & Eng. Ann. Cas. 418, *In re Tobin*<sup>13</sup> and *Ayers v. Ayers*<sup>14</sup> are cited as contrary to this. In the *Tobin* case the court said:

"We have never held that it is necessary to a valid attestation that the testator must be able to see the pen and the letters composing the witness' name as the former is held and the latter are traced by the subscribing witness. If he can see the act of attestation—that is, can see enough of the act of signing to know that the witnesses and the will are in his presence, and that the former are at the time signing their names, as witnesses to his will in accordance with his request—that will be sufficient. It is necessary only that the attestation be done in his presence, and that he be able to see the act."

In *Ayers v. Ayers* (*ante*) the testator was so supported that he could see the motions of the pen used by the witnesses, though he could not distinguish the letters the pen was forming. His eyes were open during the signing. *Held*, a sufficient compliance with the statute.<sup>15</sup>

(1) *The testator saw the witness.*

This is, perhaps, the only clear-cut and simple rule which could be easily applied, and yet it seems to be about the only one which has never been applied. The reason, of course, is that it is too strict<sup>16</sup> and would invalidate too many wills. Among others that of the "blind man" about whom so much has been said in discussing the rule and whose case is somewhat similar to that of the injured man in *Riggs v. Riggs* (*ante*). Of course if such

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turn his head so that he might look and see the paper writing as it was being subscribed, the attestation was not according to the requirements of the statute." *Montgomery, J.*, in *Burney v. Allen*, 125 N. C. 314, 320, 321, 34 S. E. 500, 502, 74 Am. St. Rep. 637 (1899).

<sup>13</sup> 196 Ill. 484, 63 N. E. 1021.

<sup>14</sup> 43 N. J. Eq. 565, 12 Atl. 621.

<sup>15</sup> See *In re Beggan's Will*, 68 N. J. Eq. 572, 59 Atl. 874. *Cost. Cas. Wills* 148 (1905).

<sup>16</sup> "If actual sight were necessary, it would vitiate a will if the testator did but turn his back, or look off, though literally present by being at the spot where the thing was done." *Bynum v. Bynum*, 33 N. C. 632 (1850).

a rule were applied the case of a blind man would simply be an exception, and the rule to be applied would be like that in the case of *Piercy*:<sup>17</sup> i. e., it was good if the testatrix could have seen the witnesses sign, had she had her eyesight.

(2) *He might have seen if he had looked.*

(a) Can he move his position, and if so how much? Is this affected by his ability or inability to see or move? Is it affected by the fact that the testator and witnesses are in different rooms?

An examination of the decided cases discloses the fact that this test (seeing the witness sign), is probably applied more often than that given by the New Hampshire court as the "general if not universal one" in *Healey v. Bartlett* (ante), but there are different opinions when the question arises as to how he must have looked. Only straight in the direction that his head is turned at the particular moment of signing, or may he turn his head a little, or as far as he can? Must his body be still or can he move that too, and again, how far? A strict construction here would seem to work a hardship in some cases, but the courts that hold that he must be in a position where he can see if he cares to look have a rule which at least has the merit of being definite, and enables a prospective testator to know (if he knows the law as he is presumed to) just what he must do.<sup>18</sup>

Although there are certainly a number of cases which reject this and retain the more indefinite though more liberal rule heretofore referred to,<sup>19</sup> it is submitted that the weight of authority

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<sup>17</sup> *Prerogative Court of Canterbury*. 1845. 1 Rob. Ecc. 278. Cost. Cas. Wills, p. 159.

<sup>18</sup> "It is true it is not essential that a testator should actually see the witnesses attest his will, but it is necessary that he should be in a situation which would give him the capacity for doing so if he should desire it." *Edelen v. Hardy's Lessee*, 7 Har. & J. (Md.) 61. (1826), 16 Am. Dec. 292, 294. For other cases in support of this rule see 6 Am. & Eng. Ann. Cas. 415. According to *Reed v. Roberts*, *infra*, the will of a blind man is exceptional to this. See also *Roy v. Hill*, 3 Strobh. L. (S. C.) 297.

<sup>19</sup> See *Maynard v. Vinton*, 59 Mich. 139, 26 N. W. 401, 60 Am. Rep. 276, for an approval of the more liberal construction and a criticism of

is in favor of this test, although there are a number of exceptions, which from an examination of the following cases and those heretofore cited seem to be due largely to: (1) *Dicta* in some of the earlier cases; (2) A desire, if possible to uphold the will, and in doing so to decide each case on its merits without any one guiding test intended to be generally applicable.

In *Sires v. Glascock*,<sup>20</sup> the testator had desired the witnesses to go into another room seven yards distant, but there was a window broken through which the testator might see them. In holding the will valid the court says: "It is enough if the testator might see, it is not necessary that he should actually see

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a strict construction in the following language: "What is meant by the requirement that it shall be attested and subscribed in the presence of the testator has been the subject of numerous decisions, some of which have carried the meaning of the word 'presence' to a ridiculous absurdity. The object of the statute is to protect the testator against the fraud of parties witnessing the instrument, and prevent the substitution of one writing for another; and so astute have some courts been in construing the statute to prevent fraud upon the testator that they have perpetrated the most glaring frauds upon the testator by defeating his will simply because the footboard of the bed was too high for the testator to see the witnesses sign their names at a table standing at the foot of the bed (*Newton v. Clarke*, 2 Curt. 320);" [the decision, however, in this case was in favor of the validity of the will. See statement of case, *infra*] "or because although the witnesses were in plain sight of the testator, yet when they signed, their backs were toward him. *Graham v. Graham*, 32 N. C. 219. And the courts have held that where the testator is a blind person, still the witnesses must subscribe in such position and proximity that had the testator been possessed of eyesight, he could have seen them; thus making the test of sight the limit of personal presence. If this is the correct criterion then the rule instead of being uniform is subject to great fluctuations, according to the degree of eyesight a person has. What would be in the presence of a far-sighted person, would be in the absence of a near-sighted one; and what would be a valid execution of a will for one would be wholly worthless for another with equal mental capacity; and a person wearing his eyeglasses or spectacles would have a larger presence than when he laid them aside. Under such a rule, the oculist would appear to be the most important witness to establish or destroy the legal attestation and execution of a will. \* \* \* I confess I do not see why the word 'presence' should not be held to convey the idea attached to its ordinary signification in the common use of language." See also *Wright v. Lewis*, 5 Rich. L. (S. C.) 212, 55 Am. Dec. 714 (1851).

<sup>20</sup> C. P., 1687, 2 Salk. 688.

them sign; for at that rate if a man should but turn his back, or look off, it would vitiate the will. Here the signing was in view of the testator; he might have seen it and that is enough." The court then adds the following *dictum*, which would seem to have been accepted as the basis for a liberal construction of the statute in some of the later cases: "So if the testator being sick should be in bed and the curtain drawn."

Six years later in *Davy v. Smith*<sup>21</sup> we have the same *dictum* only this time it is assumed that the curtains of the bed are drawn "close." In this case the testator might have seen the witnesses subscribe their names if he would. Therefore the court's decision in favor of the validity of the will required no extension of the rule heretofore considered.

The same is true of *Casson v. Dade*,<sup>22</sup> although it happened accidentally. Being asthmatical, and the attorney's office where the will was drawn up very hot, the testatrix retired to her carriage to execute the will. The carriage happened to get in such a position of proximity to the window that she could see what was going on in the office.<sup>23</sup> This was sufficient.

In *Newton v. Clarke*<sup>24</sup> one of the witnesses attesting the codicil signed it upon a small table placed between the foot of the bed and the fire, where the curtains were still closed, so that the testator might not have seen him sign. (The curtains of the bed were drawn open on both sides but closed at the foot.) The decision favoring the will seems to be placed chiefly upon the ground that the attestation took place in such immediate proximity to the testator. "It took place in the chamber where the deceased lay, which was small (not a large one, where he could not see what was going on), and the probability is that all that was going on was heard by the deceased, the bed curtains being open at both sides, and only closed at the foot, to screen him from the fire." The only case referred to is *Casson v. Dade*<sup>25</sup> in which, it is said, "The doctrine of constructive presence was

<sup>21</sup> K. B., 1693, 3 Salk. 395.

<sup>22</sup> Ch., 1781, 1 Bro. C. C. 99.

<sup>23</sup> See *Russell & Lux v. Falls*, 3 Har. & McH. (Md.) 457, 1 Am. Dec. 380.

<sup>24</sup> Prerogative Court of Canterbury (1839), 2 Curt. 320, 4 Gray's Cas., 2 ed., 190.

<sup>25</sup> *Supra*.

carried to a great length." However, in that case, as we have seen, the testatrix could have seen the witnesses although she was out in her carriage, while in this case the testator was in the same room but could not see the witnesses.

In *Goods of Coleman*<sup>26</sup> the witnesses subscribed their names at a table in the adjoining bedroom. The folding doors between this room and the testator's room were open, but the table was so situated that it was impossible for the deceased to have seen them. He was ill in bed and apparently exhausted. It was held not to be a good attestation, apparently because "it was impossible for the deceased to see the witnesses."<sup>27</sup>

In *Tribe v. Tribe*<sup>28</sup> although there was a conflict of testimony, according to the statement of the attesting witnesses, which was accepted as the correct version, the bed curtains were closed and anyway the state of the testatrix was such that she could not have turned herself in her bed so as to have seen the witnesses sign. Presumably, however, they were in the same room, as it is said "under this state of circumstances what difference would there have been, on principle, if the witnesses had signed the will down stairs?"<sup>29</sup> *Newton v. Clarke* is apparently affirmed but to "hold the attestation in the present case good" would be to "go infinitely beyond that case." The difference seems to be in the physical condition of the person making the will, but it is difficult to reconcile the two cases.

In *Norton v. Bazett*<sup>30</sup> the witnesses were in an adjoining room at a desk which could be seen from parts of the testator's room, but not from the part where he was sitting, unless he got up from his chair and moved two or three steps towards the open door between the two rooms. The will was held invalid.

<sup>26</sup> Prerogative Court of Canterbury (1842), 3 Curt. 118, 4 Gray's Cas., 2 ed., 191.

<sup>27</sup> Accord. *Jones v. Tuck*, 48 N. C. 202 (1855), which, by the way, is cited with disapproval in *Riggs v. Riggs*, *supra*.

<sup>28</sup> Prerogative Court of Canterbury (1849), 1 Rob. Ecc. 775; 4 Gray's Cas. 2 ed., 193.

<sup>29</sup> In *Norton v. Bazett*, *supra*, it is said in reference to *Tribe v. Tribe*: "The witnesses subscribed in the same room."

<sup>30</sup> Prerogative Court of Canterbury (1856), Deane 259; 4 Gray's Cas., 2 ed., 193.

It is said that *Tribe v. Tribe* seems, until closely examined, at variance with *Newton v. Clarke*, but the distinguishing feature, as heretofore suggested, is said to be that in the *Tribe* case the deceased could not possibly have seen the witnesses.

In *Reed v. Roberts*<sup>31</sup> "the testator executed his will in extremis. He was very sick, and in great pain at the time, and died shortly afterwards. The bed upon which he lay had half stand-posts for curtains. There was a counterpane stretched across the head, to protect him from the air. Thus situated, he was raised up and supported, leaning on the shoulder of a friend, until he signed the will himself. It was then taken back of the head of the bed, to a chest, against the wall, some seven or eight feet distant, where it was attested by the subscribing witnesses. It is not pretended that he actually saw them. The weight of the testimony is, that he was unable, without help, to have changed his position, so as to have seen the witnesses subscribe. It is admitted that, by removing the curtain in the rear, and turning his head, or elevating his head, above the level of the screen, and turning, or being moved more toward the side of the bed and turning his head and shoulders, so as to have looked around the post, he could have witnessed the attestation." The court decided against the will and in criticising some of the more liberal constructions said:

"Well may it be regretted that this doctrine of the constructive presence of the testator was ever carried so far. It has not only, in the language of Chancellor Kent, 'opened the door to very extensive litigation,' but lighted up a flood gate, through which a torrent is rushing that threatens to sweep away all the old landmarks of the law upon the subject of the execution of wills. And where will it stop? If any change in the position of the testator is required, how much or how little will do? Can any rule be prescribed? If the attestation is sufficient, provided it could be seen by the testator, by drawing aside the surrounding curtains, or elevating his head over the screen at his head, or by turning his head, shoulders and body in the bed, why by not changing the position of his whole body from the right side to the left, or even getting out of his bed? Nay, why

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<sup>31</sup> 26 Ga. 294; Cost. Cas. Wills, 151 (1858).

stop at this? If the testator's situation be such that he can not see the subscription by the witnesses by the exertion of his own power and volition, why should it not be sufficient to satisfy the requisition of the statute, according to this liberal and latitudinous construction of it, if the testator might cause himself or the witnesses to be placed in such a situation as he might see their attestation.

"Presence is not defined in the statute. It is obviously not synonymous with being in the same room. A testator may see as accurately what is passing in another room as if done in the same room. And, on the contrary, he may be so situated as not to see what is transacting in the same room where he lies, and thus have a false paper surreptitiously executed as his will. The object of the law can only be effectuated when the testator is so situated, both as to the will and the witnesses, that he may, if he chooses, see both, in the act of attestation."

As to the question of whether the testator and the witnesses are in the same or different rooms it is of course more likely that he knows what is happening in the room where he is but this may not be so. The size of the rooms, the furniture and other obstructions, whether the testator is near the door and numerous other things, affect it. Therefore *prima facie* it is in his presence in the same room and not in another. The contrary of either of these propositions might be shown if there was evidence to show it.<sup>32</sup>

*P. H. Winston.*

CHAPEL HILL, N. C.

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<sup>32</sup> See cases collected in 6 A. & E. Ann. Cas., pages 415 & 417; and 114 Am. St. Rep. 229.